173

No. 09-1576

SUPREME COURT, U.S.
FILED
OCT 27 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES BANNISTER,

Petitioner,

v.

ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

BRIEF IN OPPOSITION

ANITA ALVAREZ
State's Attorney
Cook County, Illinois
ALAN J. SPELLBERG
Counsel of Record
MICHELLE KATZ
JOHN E. NOWAK
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496
alan.spellberg@cookcountyil.gov

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street,
12th Floor
Chicago, Illinois 60601
(312) 814-3000

Attorneys for Respondent

232976

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In entering a plea agreement with a witness at petitioner's trial, the State relied upon the witness's account of the crime provided immediately following the crime and in pre-plea interviews.

Did it violate due process for the plea agreement to include a requirement that the witness testify at trial in a manner consistent with his earlier statements to law enforcement, where the same agreement – in multiple plea provisions that petitioner does not challenge – additionally required the witness to testify truthfully at petitioner's trial and required that his earlier statements also prove to be truthful?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
BRIEF IN OPPOSITION	1
STATEMENT	1
REASONS FOR DENYING THE PETITION	8
I. This Case Implicates No Split In Authority Worthy Of Certiorari Review	8
II. Certiorari Should Be Denied On The Independent Ground That Eliminating The So-Called "Consistency" Clause That Petitioner Challenges Would Not Have Changed Johnson's Incentive To Testify Truthfully And Consistently At Trial	18
III. On The Merits, The Illinois Supreme Court Correctly Concluded That The Plea Agreement Protected Petitioner's Right To Due Process Because It Repeatedly Provided That The Witness Had To Testify Truthfully And That The Agreement Would Become Void If The Representations Upon Which It Was Based Were False	21
CONCLUSION	24

TABLE OF CITED AUTHORITIES

Page

CASES

Franklin v. State,
577 P.2d 860 (Nev. 1978) 17

Giglio v. United States,
405 U.S. 150 (1972) 21

Hoffa v. United States,
385 U.S. 293 (1966) 22

Jackson v. Virginia,
443 U.S. 307 (1979) 23

People v. Allen,
729 P.2d 115 (Cal. 1986)..... 14, 15

People v. Garrison,
765 P.2d 419 (Cal. 1989)..... 14-15, 18

People v. Green,
228 P.2d 867 (Cal Ct. App. 1951) 10

People v. Jenkins,
997 P.2d 1044 (Cal. 2000)..... 15, 17

People v. Jones,
600 N.W.2d 652 (Mich. App. Ct. 1999) 6, 9

People v. Medina,
41 Cal. App. 3d 438 (Cal. Ct. App. 1974)
..... 10, 15, 16, 18

Cited Authorities

Page

Santobello v. New York,
404 U.S. 257 (1971) 21

Sheriff, Humboldt County v. Acuna,
819 P.2d 197 (Nev. 1991) ..... *passim*

State v. Bolden,
979 S.W.2d 587 (Tenn. 1998)..... 6, 9, 10

State v. Burchett,
399 N.W.2d 258 (Neb. 1986)..... 9, 10, 16, 17

State v. Clark,
743 P.2d 822 (Wash. Ct. App. 1987)..... 9-10, 16, 17

State v. DeWitt,
286 N.W.2d 379 (Iowa 1979)..... 16, 17

State v. Dixon,
112 P.3d 883 (Kan. 2005)..... 15, 16

State v. Fisher,
859 P.2d 179 (Ariz. 1993)..... 12, 13, 15, 16

State v. Nerison,
401 N.W.2d 1 (Wis. 1987) 9, 12

State v. Rivera,
109 P.3d 83 (Ariz. 2005)..... *passim*

Cited Authorities

Page

State v. Rivera,
86 P.3d 963 (Ariz. App. Ct. 2004) 15

United States v. Gilliam,
23 C.M.A. 4 (1974) 14

United States v. Stoltz,
14 C.M.A. 461 (1964) 14

OTHER AUTHORITIES

Stern *et al.*, *Supreme Court Practice*, § 4.4
(8th ed. 2002) 15

BRIEF IN OPPOSITION

Respondent, the State of Illinois, respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the Illinois Supreme Court affirming petitioner's convictions for first degree murder.

STATEMENT

Following the November 9, 1989, shooting deaths of Dan Williams and Thomas Kaufman, petitioner James Bannister and six others were charged with two counts of first degree murder. Pet. App. 2a, 33a. Petitioner was tried jointly with five of his co-defendants (Thomas Carter, Michael Meyers, Eric Smith, James Young, and Kevin Young). *Id.* at 33a-34a. The remaining co-defendant, Michael Johnson, was granted a severance and was tried separately. *Id.* at 34a. All seven men were convicted on both counts of first degree murder. *Id.* at 2a. After several appeals and post-conviction petitions, the trial court ordered a new trial for petitioner and codefendant Smith based on a claim of newly discovered evidence following an evidentiary hearing on their post-conviction petitions. *Id.* at 3a. The remaining defendants did not receive new trials. *Ibid.*

Johnson did not testify at petitioner's first trial. At petitioner's new trial, however, Johnson testified against petitioner pursuant to a plea agreement reached with the People. *Id.* at 3a-4a. The plea agreement, by its terms, required Johnson to "testify truthfully in all matters regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman" and required that "[s]uch truthful

testimony shall be consistent with" his post-arrest statements and with his statements in the pre-plea agreement interviews. *Id.* at 68a. The agreement also provided that it would be "render[ed] null and void, and all violations of criminal law by Michael Johnson will be fully prosecuted by Cook County State's Attorney's Office" if the "[r]epresentations made by Michael Johnson during his post-arrest statements and his pre-plea agreement interviews, upon which this agreement was predicated . . . are found to be false." *Id.* at 70a. The parties also agreed to move to vacate Johnson's existing sentence and to place the case back on the trial court's trial call. *Ibid.* As part of the agreement, Johnson pledged to plead guilty to the first degree murder of Dan Williams, and the People agreed to nolle pros the first degree murder count involving Thomas Kaufman. *Ibid.* The People also agreed to recommend that the trial court sentence Johnson to sixty years in prison. *Ibid.* The agreement was contingent on the trial court accepting all of the terms in their entirety. *Ibid.*

Following a bench trial, the trial court found petitioner guilty of the first degree murders of Dan Williams and Thomas Kaufman. *Id.* at 7a. The trial evidence established that on November 9, 1989, petitioner, Smith, Carter, and Kevin Young ran into Johnson, James Young, and Meyers at the Stateway Gardens housing projects in Chicago. Pet. App. 6a. All seven men went upstairs to the apartment of Tiya Young, the niece of Kevin Young. *Ibid.* There, they talked about the recent sexual assault a few days earlier of Kevin Young's girlfriend. *Ibid.* They talked about getting revenge on the Del Vikings gang because they believed that the Del Vikings were responsible. *Ibid.* They discussed retaliating physically and shooting people. *Ibid.*

The seven men then left and went to another building in the complex. *Ibid.* All had guns. *Ibid.* Petitioner had a .357 revolver. Pet. App. 39a.

When they arrived at 3618 South Federal Street, a man with the nickname "Rick James" came out of that building. *Id.* at 6a, 39a. Rick James greeted petitioner by petitioner's nickname. Pet. App. 6a. Kevin Young shot at Rick James. *Ibid.* After he shot at Rick James, all seven men ran to the 3547-3549 building. *Id.* at 6a, 39a.

The seven armed men stayed at the 3547-3549 building for ten to twenty minutes, and then they went back to Tiya Young's apartment. Pet. App. 40a. They stayed there for approximately 45 minutes to an hour and talked and smoked. *Ibid.* They then left that apartment and walked to another building in the complex. *Id.* at 6a, 40a.

When they arrived, the men encountered Daniel Nicholson, who was in a wheelchair. *Ibid.* Nicholson had just come off the ramp and had turned into the building in his wheelchair. Pet. App. 40a. Kevin Young, Smith, Meyers, and James Young went into the hallway behind Nicholson. *Id.* at 40a, 42a. Petitioner, Johnson, and Carter stood on the first-floor porch. *Ibid.* The four men near Nicholson robbed him. *Id.* at 6a, 40a. Kevin Young reached into Nicholson's pockets, and Nicholson took off some of his gold chains and gave them to Kevin Young. Pet. App. 40a. At this point, all seven men had their guns out. *Id.* at 40a, 42a.

After Kevin Young took the chains from Nicholson, the seven men left and returned to 3547-3549 South Federal Street. *Id.* at 6a, 40a. Johnson then told the others that he

was going upstairs to his apartment to get a ski mask and some "wave" caps, which resemble scarves. *Ibid.* After retrieving the ski mask and caps, Johnson rejoined the others and gave caps to Kevin Young and Carter, while keeping the ski mask for himself. *Ibid.*

The seven men then walked together through the breezeways to the building at 3517-3519 South Federal, where Johnson and Meyers went to the side of the building near the back hallway. *Id.* at 40a. Smith, Kevin Young, and Carter stood behind what Johnson called the "mailbox" in the breezeway area. *Ibid.* Petitioner and James Young stood on the 3519 side of the building. *Ibid.*

As Johnson and Meyers walked through the back hallway, they encountered Gregory Gordon, Willie Sims, and two women who were standing by the elevators. *Ibid.* Johnson was wearing his ski mask, and Meyers was wearing a "wave" cap. *Ibid.* Johnson and Meyers also encountered Denise Brady, Antoinette Barry, and Joe Johnson, who were emerging from the 3517 building via the stairway. *Ibid.*

Johnson then heard Smith say, "come here, mother * * *." *Id.* at 41a. Nicholson and Gordon also heard that statement. *Id.* at 42a-43a. Upon hearing the gunshots, Johnson and Meyers went to the front of the building to see what was happening. *Id.* at 7a, 41a. Johnson saw Dan Williams running. *Ibid.* Petitioner, Smith, Johnson, Meyers, Carter, Kevin Young, and James Young all fired their guns at Williams. *Ibid.* Kevin Young stood behind the mailbox, just under the breezeway, with Smith and Carter. *Id.* at 41a. Petitioner and James Young stood on the ramp from the 3519 side of the building. *Ibid.* Petitioner,

James Young, Kevin Young, Smith, and Carter stepped out from underneath the building while shooting at Williams. *Ibid.* Johnson also shot at Williams, who ran to the playlot, jumped the fence, and ran toward 35th Street and the Illinois Institute of Technology building. *Id.* at 7a, 41a. Williams was fatally shot upon arriving at the building, as was Thomas Kaufman, a security guard there. *Id.* at 2a.

When the shooting stopped, Johnson retrieved a .25 automatic shell casing that had been discharged from his gun and put it in his pocket. *Id.* at 41a. All seven of the shooters then went back south towards the 3547 building. *Id.* at 7a, 41a.

At the conclusion of the bench trial, the court found petitioner and co-defendant Smith guilty of the first degree murders of Dan Williams and Thomas Kaufman and sentenced petitioner to natural life in prison. *Id.* at 7a. Petitioner appealed and raised several issues, including whether "he was denied due process and deprived of a fair trial based upon the plea agreement entered into between the prosecution and co-defendant Michael Johnson." *Id.* at 33a.

The Illinois Appellate Court rejected all of petitioner's arguments. About the challenge to Johnson's plea agreement, the court held that petitioner did not have standing to contest the validity or enforcement of the plea agreement because petitioner was not a beneficiary of that agreement. *Id.* at 53a. And even if petitioner had standing, the appellate court held, and "even if the plea agreement were found to be invalid, the only consequence would be that it could not have been enforced by either the State or Johnson." *Id.* at 56a. The court further noted that

petitioner had failed to cite any authority indicating that a determination that the plea agreement was invalid would have required suppression of Johnson's testimony. *Ibid.*

The appellate court also rejected petitioner's argument that he was deprived of due process and a fair trial based upon the terms of the plea agreement, which required Johnson to testify truthfully and consistently with his post-arrest statements and statements made to the prosecutors. *Id.* at 48a-52a. Following the reasoning of decisions from other States, the appellate court held that consistency provisions such as the one in Johnson's plea agreement are permissible when they are accompanied by terms requiring the witness to testify truthfully. *Id.* at 48a-51a. Accordingly, the appellate court concluded that "Johnson's testimony was not tainted by the plea agreement, and the admission of his testimony, induced by the plea agreement, did not violate the petitioner's rights to due process and a fair trial." *Id.* at 52a.

Following the appellate court's decision affirming his convictions, petitioner filed a petition for leave to appeal to the Illinois Supreme Court, which that court allowed. *Id.* at 1a-2a, 7a-8a. Like the appellate court, a majority of the supreme court analyzed cases from other jurisdictions and held that the plea agreement here did not violate petitioner's due process rights because it repeatedly required Johnson to testify truthfully. *Id.* at 10a-17a. Relying on *State v. Rivera*, 109 P.3d 83 (Ariz. 2005), *State v. Bolden*, 979 S.W.2d 587 (Tenn. 1998), *People v. Jones*, 600 N.W.2d 652 (Mich. Ct. App. 1999), and *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (Nev. 1991), and relying on the specific terms used in Johnson's plea agreement, the supreme court held that the agreement did not taint Johnson's testimony, and its admission did not

violate petitioner's due process rights. Pet. App. 13a-17a. As the supreme court explained:

> Here, the plea agreement repeatedly and explicitly obligated Johnson to testify truthfully. The agreement also provided that Johnson would testify in a manner that was consistent with his prior statements to police and to prosecutors, but if any of the representations contained in his prior statements were found to be false, the agreement would be rendered null and void. Truthfulness was the overriding requirement of the agreement. The agreement neither compelled Johnson to disregard his witness' oath, nor bound him to a particular script or result. Accordingly, Johnson's testimony was not tainted by the plea agreement, and the admission of his testimony did not violate the defendant's rights to due process and a fair trial.

Id. at 17a. The supreme court observed that, at trial:

> [t]he State, on direct examination of Johnson, fully disclosed the terms of the plea agreement with him, and the defendant had an opportunity to cross-examine Johnson about the agreement and the benefits he would receive. The trial court heard the details of Johnson's plea agreement and found him to be credible nonetheless. As the finder of fact, it was the trial court's responsibility to resolve alleged inconsistencies and conflicts in the evidence, as well as to weigh the testimony and determine the credibility of the witnesses.

Id. at 18a.

Following the Illinois Supreme Court's decision, petitioner filed a petition for rehearing, which the court denied on January 25, 2010. *Id.* at 67a.

REASONS FOR DENYING THE PETITION

Petitioner's claim regarding whether the Due Process Clause is violated by a plea agreement that requires truthful testimony consistent with a witness's prior statements is not worthy of certiorari review for three reasons. First, no split of authority exists on this point. The lower courts agree that plea agreements like Johnson's are proper because they expressly require the witness to testify truthfully. Second, even if the so-called "consistency" clause had been excised from this particular plea agreement, the alleged incentive for Johnson to testify consistently would have remained the same because the unchallenged terms in the "Limitations of Plea Agreement" would have rendered the agreement "null and void" if he did not testify truthfully at trial or if the representations he made to police and prosecutors upon which the agreement was predicated were found to be false. Finally, the Illinois Supreme Court was correct on the merits.

I.

This Case Implicates No Split In Authority Worthy Of Certiorari Review.

As the Illinois Supreme Court and many other courts have held, a plea agreement based on a witness testifying similarly to, or consistently with, a prior statement is proper under the Due Process Clause so long as the plea

agreement is also expressly conditioned on the witness testifying truthfully. See *State v. Rivera*, 109 P.3d 83, 86-89 (Ariz. 2005) (en banc) (also citing cases); *People v. Jones*, 600 N.W.2d 652, 657-658 (Mich. App. Ct. 1999); *State v. Bolden*, 979 S.W.2d 587, 591-592 (Tenn. 1998); *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197, 198 (Nev. 1991); *State v. Nerison*, 401 N.W.2d 1, 8 (Wis. 1987). As *Jones* explained:

> When a prosecutor decides to bargain with a witness on the basis of representations made by the witness during negotiations with the state, it is reasonable for the prosecutor to rely on the witness' assertion that such representations are truthful – especially when the representations are consistent with other facts within the prosecution's knowledge of the case.

Jones, 600 N.W.2d at 657. Accordingly, "it is reasonable to allow the prosecution to condition a grant of immunity, or other favorable treatment, on the truthfulness of the information providing the basis for the favorable treatment." *Ibid.* In *Jones*, as here, "by agreeing to testify truthfully at trial in conformance with their prior statements to the police, the immunized witnesses effectively represented to the prosecution that their prior statements had been truthful." *Id.* at 658.

Likewise, in *Bolden*, the Tennessee Supreme Court held that expecting particular testimony from a witness as a condition of a plea agreement is not a violation of due process so long as the testimony must be truthful. *Bolden*, 979 S.W.2d at 591-92 (citing *State v. Burchett*, 399 N.W.2d 258, 266-67 (Neb. 1987); *State v. Clark*, 743

P.2d 822, 828-29 (Wash Ct. App. 1987); *Acuna*, 819 P.2d at 200-01). As the *Bolden* court observed, "[s]everal state courts have concluded that requiring specific testimony of a co-defendant as a condition of a plea agreement is not a violation of due process so long as the testimony is required to be truthful." *Id.* at 591. The court noted that "'it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require * * * preclusion.'" *Id.* (*quoting Burchett*, 399 N.W.2d at 266-67). *Bolden* thus distinguished on their facts cases in which the plea agreement required *only* that the witness testify in a particular fashion or that the testimony produce a specific result, without regard to the truthfulness of the testimony. *Id.* at 592 n.3 (*citing People v. Medina*, 41 Cal. App. 3d 438, 455 (Cal Ct. App. 1974); *People v. Green*, 228 P.2d 867, 868-72 (Cal Ct. App. 1951)). Because the plea agreement in *Bolden* specifically required the co-defendant to testify truthfully, that condition "necessarily engulfed" the other terms in the agreement, compliance with which was "hinged upon truthful testimony." *Id.* at 592. The court held that the codefendant's testimony did not violate the defendant's rights to due process and a fair trial even though it had been induced by a plea agreement that required consistency with a prior statement because that same agreement required truthful testimony. *Id.* at 593.

The Nevada Supreme Court has explained why such agreements are not just legal and enforceable, but also reasonable:

> [I]t would be neither realistic nor fair to expect the State to enter into a bargain without assurances that the promisee's trial testimony

> would be consistent with the information he or she provided to prosecutors as a basis for leniency. We are simply unwilling to assume, and therefore base a rule of law upon, the proposition that our prosecutors will sit down with persons vulnerable to prosecution and commit them to testifying perjuriously. If the person seeking the bargain purports to have true information, and the State concludes that such information is reliable and would be of assistance in prosecuting other persons, the State, in return for a commitment of leniency, would have every right to expect that the promisee's trial testimony would be essentially consistent with the original information upon which the State's promise was induced. If the promisee reneges on the commitment to provide truthful and consistent trial testimony, the State will be free to withdraw from the bargain.

Acuna, 819 P.2d at 198. Accordingly, the Nevada Supreme Court held that "[w]e now conclude that bargaining for specific trial testimony, i.e., testimony that is essentially consistent with the information *represented to be factually true* during negotiations with the State, and withholding the benefits of the bargain until after the witness has testified, is not inconsistent with the search for truth or due process." *Id.* (emphasis added).

Similarly, the Wisconsin Supreme Court has held that a plea agreement that required a witness to testify consistently with his testimony at an earlier hearing was "no different from any other [case] involving negotiated plea agreements with accomplices in exchange for their

testimony." *Nerison*, 401 N.W.2d at 8. *Nerison* explained that, "[u]ltimately, it is for the jury as factfinder to weigh the testimony and evaluate credibility before making its ultimate determination in the form of its verdict as to what is the 'truth.'" *Id.*

The Arizona Supreme Court reached the same result in *Rivera*. There, the prosecution entered into plea agreements with two witnesses who admitted to being accomplices of the defendant. 109 P.3d at 84. Each witness avowed in the agreement that statements given in earlier videotaped interviews were fully accurate and truthful. *Id.* And the agreements stated that each agreement by the State was made on the basis that the witnesses' avowals were true. *Id.* The witnesses also agreed in the plea agreement to testify fully, accurately, and truthfully in any trial against her co-defendants. *Id.* At trial, each witness testified that she understood that any significant variation from the statements each made in the earlier pre-trial interview could cause that witness to lose the benefit of her plea agreement. *Id.* at 84-85. Each witness also testified that she understood that the plea agreement required her to testify truthfully, and that she had done so. *Id.* at 85.

The defendant in *Rivera* argued that, pursuant to prior Arizona precedent (*State v. Fisher*, 859 P.2d 179 (Ariz. 1993)), the plea agreements contained illegal consistency clauses that deprived him of a fair trial. *Rivera*, 109 P.3d at 85. The Arizona Court of Appeals agreed and reversed and remanded for a new trial. *Ibid.* The Arizona Supreme Court subsequently "granted review to decide whether the court of appeals misapplied *Fisher []* in holding that the accomplice witnesses' plea agreements were impermissible consistency agreements." *Ibid.*

The Arizona Supreme Court reversed the court of appeals and affirmed the defendant's conviction, holding that the plea agreements were lawful. *Id.* at 86-89. The court noted that the plea agreements required the witnesses to testify truthfully and to avow that their prior statements were truthful. *Id.* at 86. The Arizona Supreme Court then distinguished *Fisher* because the plea agreement there did not require the witness to testify truthfully, but only required the witness to testify consistently with her prior statement regardless of its truth. *Ibid.* As the court explained, "[o]ur concern in *Fisher []* was that enforcing a consistency provision would allow the prosecutor 'to persuade an accomplice to disregard his oath of truthfulness' in order to obtain a lenient plea deal." *Ibid.* (*quoting Fisher*, 859 P.2d at 184).

Significantly, the Arizona Supreme Court stated that "[t]he critical issue is not whether the witness will feel an obligation to testify to the same facts earlier told the prosecutors or police, but rather whether the prosecution has conditioned the plea agreement upon such testimony, regardless of the truth of the earlier statement." *Ibid.* The court observed that "a consistency agreement has the strong potential to procure untruthful testimony if the agreement is not also conditioned upon the requirement of truthful testimony," and that "[i]t is this tainting of the 'truth-seeking function of the courts' that makes consistency provisions invalid." *Ibid.* As a result, the court held, "what *Fisher []* forbids is an agreement that requires the witness to testify consistently with a previous statement at trial even when doing so would render the trial testimony untruthful." *Ibid.*

Here, the plea agreement with Johnson repeatedly required that Johnson testify truthfully. For example, in

its first sentence, the agreement states: "It is agreed that Michael Johnson will testify truthfully regarding the 1st Degree Murders of Dan Williams and Thomas Kaufman * * *." Pet. App. 68a. The next sentence states that "[s]uch truthful testimony shall be consistent with" Johnson's post-arrest statements and with his statements in the pre-plea agreement interviews. *Ibid.* The first sentence of the next paragraph also states that "[i]t is agreed that Michael Johnson will testify truthfully in the case of *People v. James Bannister and Eric Smith* * * *." Pet. App. 69a. The first sentence of the following paragraph again refers to Michael Johnson's "truthful testimony" in this case. Pet. App. 69a. The trial court, as the trier of fact, heard all of the evidence, including the facts surrounding Johnson's plea agreement. Pet. App. 18a. After considering all of these facts, the court found Johnson to be credible and that Johnson told the truth when he testified at trial. Pet. App. 18a. The decision of the Illinois Supreme Court below thus is in accord with the forgoing authority. In contrast, petitioner's supposed split is illusory.

Petitioner points to the decisions of the United States Court of Appeals for the Armed Forces in *United States v. Gilliam*, 23 C.M.A. 4 (1974), and *United States v. Stoltz*, 14 C.M.A. 461 (1964). Pet. at 11-12. Significantly, however, neither *Gilliam* nor *Stoltz* involved a due process challenge, and the plea agreements at issue in those two cases lacked truthfulness provisions. See *Gilliam*, 23 C.M.A. at 8; *Stoltz*, 14 C.M.A. at 464-65. *Gilliam* and *Stoltz* , therefore, do not conflict with the decision below.

Nor do the California cases on which petitioner relies conflict with the decision below. Petitioner cites *People v. Allen*, 729 P.2d 115, 130-31 (Cal. 1986), and *People v.*

Garrison, 765 P.2d 419, 430 (Cal. 1989) (Pet. at 12-13), both of which relied on *People v. Medina*, 41 Cal. App. 3d 438 (Cal. Ct. App. 1974). In none of those cases, however, did the agreement contain a truthfulness provision. Indeed, the California Supreme Court more recently clarified the *Medina* rule, holding that a plea agreement requiring an accomplice to testify fully and truthfully is valid, "even if it is clear the prosecutor believes the witness's prior statement to the police is the truth, and deviation from that statement in testimony may result in the withdrawal of the plea offer." *People v. Jenkins*, 997 P.2d 1044, 1119-20 (Cal. 2000). Such an agreement does not dictate the accomplice's testimony in a manner that would offend due process. *Ibid.* Accordingly, *Garrison* and *Allen* are distinguishable from the instant case, and *Jenkins* makes clear that there is no split between California and Illinois over agreements, such as Johnson's, that require the witness to testify truthfully. Accordingly, *Garrison* and *Allen* are not grounds for granting certiorari. See generally Stern *et al.*, *Supreme Court Practice*, § 4.4, at 230 (8th ed. 2002) ("A conflict with a decision that has been discredited or that has lost all weight as authority by reason of intervening decisions of * * * the same court[] will not be an adequate basis for granting certiorari.").

That leaves only *State v. Dixon*, 112 P.3d 883 (Kan. 2005), but because the Kansas Supreme Court relied on overturned authority, *Dixon* provides no grounds for granting certiorari, either. *Dixon* relied for its holding almost exclusively on *State v. Fisher*, 859 P.2d 179 (Ariz. 1993), and the appellate court decision in *State v. Rivera*, 86 P.3d 963 (Ariz. App. Ct. 2004) (*Dixon*, 112 P.3d at 914-17), yet failed to recognize that the Arizona Supreme Court, two months earlier, had reversed the appellate

court in *Rivera* and limited *Fisher*. *State v. Rivera*, 109 P.3d 83, 86 (Ariz. 2005). See *supra* pp. 12-14. Given that *Dixon* conflicts with the decisions of all other courts that have addressed the constitutionality of consistency provisions, when those provisions are coupled with a requirement that the witness testify truthfully, including the Arizona Supreme Court in the very case on which *Dixon* itself relied, *Dixon*'s future in Kansas is, at best, uncertain.

Moreover, contrary to petitioner's assertion, he would not likely prevail under the laws of Iowa, Nebraska, or Washington, states in which petitioner acknowledges "courts have not directly confronted the issue." Pet. at 14. At the outset, *State v. DeWitt*, 286 N.W.2d 379, 384-85 (Iowa 1979), is far afield, for in that case the plea agreement did not require the witness to testify consistently with prior statements or that such consistent testimony be truthful. *State v. Burchett*, 399 N.W.2d 258, 266-67 (Neb. 1986), is likewise in line with the decision below because there, as here, the plea agreement required the witness to speak truthfully to a prosecutor about the crime and to testify truthfully at trial. *Burchett*, 399 N.W.2d at 266-67. The Nebraska Supreme Court confirmed the propriety of the agreement on the basis of the truthfulness requirement, *Burchett*, 399 N.W.2d at 267, just as the Illinois Supreme Court did below. And in *State v. Clark*, 743 P.2d 822, 828 (Wash. Ct. App. 1987), the court followed *Medina*, which, as explained, see *supra* p. 15, has itself been clarified to preclude any constitutional infirmity in a plea agreement requiring an accomplice to testify truthfully, "even if it is clear the prosecutor believes the witness's prior statement to the police is the truth, and deviation from that statement in testimony may result in the withdrawal

of the plea offer." *Jenkins*, 997 P.2d at 1120. Moreover, the agreement in *Clark* only imposed conditions on the witness's statement concerning the crime, not his later testimony at trial. *Clark*, 743 P.2d at 859. In short, *DeWitt*, *Burchett*, and *Clark* do not support the due process rule that petitioner avows.

Finally, as to petitioner's claim that he might prevail under the approach of the Nevada Supreme Court in *Franklin v. State*, 577 P.2d 860 (Nev. 1978), Pet. at 14-15, *Franklin* is no longer good law, having been expressly overruled by *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197 (Nev. 1991) ("Having reevaluated the *Franklin* rule and concluded that it should not be further perpetuated, we reverse without determining whether the district court erred in finding a violation of the *Franklin* standard"). In *Acuna*, upon which the Illinois Supreme Court relied, the Nevada court "conclude[d] that [its] rather isolated *Franklin* rule is of limited benefit to the search for truth, and that it in fact may tend to frustrate truth and create incentives for dissembling at trial." *Acuna*, 819 P.2d at 198. The court then held that "bargaining for specific trial testimony, i.e., testimony that is essentially consistent with the information represented to be factually true during negotiations with the State, and withholding the benefits of the bargain until after the witness has testified, is not inconsistent with the search for truth or due process." *Id.* Nevada law thus does not conflict with Illinois's.

Petitioner attempts to distinguish *Acuna* by asserting that it "reaffirmed * * * that the prosecution may not present testimony 'where the bargain [itself] compels the witness to provide particularized testimony.'" Pet. at 15 n.5 (quoting *Acuna*, 819 P.2d at 201). But *Acuna* was

speaking in the context of plea agreements that require only consistent testimony and not that the testimony also be truthful. Here, the agreement repeatedly required that the testimony be truthful, which makes petitioner's attempt to distinguish *Acuna* unavailing. Indeed, *Acuna* cited *Medina* and *Garrison* as support, and as explained *supra* p. 15, these California cases are consistent with the decision below.

In short, petitioner's alleged split is illusory, and certiorari review is unwarranted.

II.

Certiorari Should Be Denied On The Independent Ground That Eliminating The So-Called "Consistency" Clause That Petitioner Challenges Would Not Have Changed Johnson's Incentive To Testify Truthfully And Consistently At Trial.

Petitioner challenges just one part of the plea agreement with Johnson: the one-sentence requirement that "[s]uch truthful testimony shall be consistent with Michael Johnson's post-arrest statements in December 28, and December 29, 1989, to Chicago Police officers and Cook County Assistant State's Attorneys and his statements made to Cook County State's Attorney personnel during his pre-plea agreement interviews on April 29 and May 24, 2004." Pet. App. 68a. Even if this so-called "consistency" clause was excised from the plea agreement, however, Johnson's alleged incentive to testify consistently with his earlier statements would have remained the same in light of other unchallenged terms in the "Limitations of Plea Agreement" included in his plea.

The "Limitations of Plea Agreement" section provides that the agreement would become "null and void" if one of several things occurred, including (in clause "B") Johnson's "[f]ailure * * * to truthfully testify under oath in open court in the above matters" or (in clause "F") a finding that "[r]epresentations made by * * * Johnson during his post-arrest statements and his pre-plea agreement interviews, upon which this agreement was predicated," are "false." Pet. App. 70a. Read together, these "truthfulness" provisions alone required Johnson to testify at trial in substantial conformance to his prior, post-arrest and pre-trial statements, and petitioner cannot claim any meaningful distinction between that (unchallenged) incentive to testify consistently and the (challenged) incentive to do so purportedly instilled in Johnson by the "consistency" provision. If the latter gave Johnson any additional incentive to testify consistently in this case, it is difficult to see what that added incentive was, much less how it would be constitutionally significant on these facts. Indeed, notwithstanding the "truthfulness" and "consistency" provisions, Johnson felt free to make some adjustments to his account between his post-arrest/pre-trial statements and petitioner's trial. See Pet. App. 7a (noting that Johnson's trial testimony was "*substantially* consistent with the statement that he gave to the police on December 29, 1989, the day after his arrest") (emphasis added). For instance, in his 1989 post-arrest statement, Johnson omitted the entire encounter and robbery of Nicholson, which occurred between the confrontation with Rick James and the shooting of the victims. (Pet. App. 73a-83a). At trial, however, Johnson described the robbery of Nicholson in detail. Pet. App. 40a. But to avoid implicating petitioner as a murderer – which alone might have affected the outcome of this case – Johnson would

have had to change his testimony profoundly between his post-arrest/pre-plea statements and trial, and if Johnson had changed his account so fundamentally, the State would have known that at least one of two things was true: either Johnson lied when he gave his post-arrest/pre-plea statements, or he lied in court. Cf. *Rivera*, 109 P.3d at 87 (theorizing that, in some cases, "truthfulness" requirements might permit witness to make some adjustments to account between pre-trial statements and trial testimony). Either way, the plea agreement would have been void under the "truthfulness" provisions alone, without resort to the challenged, "consistency" provision.

In short, even without the challenged, express "consistency" clause at the beginning of the agreement, the rest of the agreement – which petitioner has not challenged – would have provided the same alleged incentive to Johnson to testify consistently with his earlier statements. Petitioner does not contend a split exists regarding the constitutionality of these "truthfulness" requirements. Indeed, petitioner appears to endorse them. See Pet. at 24 (arguing that "truthfulness" provisions in Johnson's plea agreement were not enough to *cure* a due process violation). But this guts his due process claim on these facts, for he must argue that the challenged "consistency" provision alone created an unconstitutional incentive for Johnson to testify consistently at trial, but he cannot begin to make that showing here where unchallenged portions of the agreement already created the same incentive. Accordingly, under these facts, certiorari would be inappropriate.

III.

On The Merits, The Illinois Supreme Court Correctly Concluded That The Plea Agreement Protected Pétitioner's Right To Due Process Because It Repeatedly Provided That The Witness Had To Testify Truthfully And That The Agreement Would Become Void If The Representations Upon Which It Was Based Were False.

Johnson's plea agreement protected petitioner's right to due process. The agreement repeatedly required that Johnson testify truthfully. Pet. App. 68a-70a. While the agreement also provided that his truthful testimony had to be consistent with his prior statements to the police and prosecutors, it also expressly stated that the agreement would be void if it was later found that those prior statements were false. Pet. App. 68a, 70a. Petitioner does not object to the "truthfulness" provisions, and the Illinois Supreme Court correctly concluded that the plea agreement here protected petitioner's right to due process because "[t]ruthfulness was the overriding requirement of the agreement." Pet. App. 17a.

Unquestionably, "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). Accomplice testimony is generally admissible at trial, even if it was procured by the offer of a lenient sentence and secured by a plea agreement. See *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Cross-examination, not exclusion, is the

appropriate method for probing the truthfulness of a witness's statement. *Hoffa v. United States*, 385 U.S. 293, 311 (1966). "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Id.* Moreover, the Nevada Supreme Court observed in *Acuna*, "it would be neither realistic nor fair to expect the State to enter into a bargain without assurances that the promisee's trial testimony would be consistent with the information he or she provided to prosecutors as a basis for leniency." 819 P.2d at 198. "We are simply unwilling to assume, and therefore base a rule of law upon, the proposition that our prosecutors will sit down with persons vulnerable to prosecution and commit them to testifying perjuriously." *Id.*

Petitioner does not object to the truthfulness provisions of the agreement or to the provision rendering the agreement void if Johnson's pre-plea statements were false. Instead, petitioner argues that the "consistency" provision makes "an accomplice feel[] pressure to stick to the prosecution's preferred version of events" and is tantamount to "vouching." Pet. at 25-27. Petitioner's argument, however, proves too much. With every plea agreement, the witness may feel implicit pressure to testify favorably to the prosecution, but as *Rivera* recognized, "[s]killful cross-examination should expose to the jury any motivation the witness may have to lie, such as to preserve a favorable plea deal, and the jury must determine the witness's credibility." *Rivera*, 109 P.3d at 85 (citing *Hoffa*, 385 U.S. at 311).

More importantly, the prosecution cannot permit perjury, and in this sense a prosecutor always implicitly "vouches" for the accuracy of the testimony of its witnesses, regardless of whether the witness is testifying pursuant to a plea agreement or not. Either way, the prosecution would not have a witness testify if it believed that the witness would testify falsely. Thus, the alleged "pressure" on Johnson and the concern that the agreement amounted to "vouching" for him is no different than if the plea agreement did not contain the one-sentence consistency provision to which petitioner objects.

In the end, petitioner received due process because the agreement here repeatedly called for Johnson's testimony to be truthful. And the prosecution, on direct examination of Johnson, fully disclosed the terms of his plea agreement. Pet. App. 18a. Petitioner cross-examined Johnson about the agreement and the benefits he would receive. *Ibid.* The trial court heard all of the details of Johnson's plea agreement and still found him to be credible. *Ibid.* As the trier of fact, it was the trial court's "responsibility * * * to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Thus, the Illinois Supreme Court correctly concluded that "Johnson's testimony was not tainted by the plea agreement, and the admission of his testimony did not violate the defendant's rights to due process and a fair trial." Pet. App. 17a. Since the lower court reached the correct result on the merits, certiorari is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANITA ALVAREZ
State's Attorney
Cook County, Illinois
ALAN J. SPELLBERG
Counsel of Record
MICHELLE KATZ
JOHN E. NOWAK
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-5496
alan.spellberg@cookcountyil.gov

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street,
12th Floor
Chicago, Illinois 60601
(312) 814-3000

Attorneys for Respondent